

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	
ALIXANDRA LOUISE FABIE)	Adversary Proceeding
(Chapter 7 Case <u>97-20171</u>))	Number <u>97-2044</u>
)	
<i>Debtor</i>)	
)	
)	
FIRST CARD)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
ALIXANDRA LOUISE FABIE)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

This action is a complaint to determine dischargeability of a debt pursuant to Title 11 U.S.C. § 523(a)(2)(A). Debtor filed a Chapter 7 bankruptcy on February 10, 1997. On May 30, 1997, Plaintiff filed this complaint to determine dischargeability of her credit card debt. By virtue of 28 U.S.C. § 157(b)(2)(I), this matter is a core proceeding. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy, this

Court tried the matter on October 9, 1997. Upon consideration of the evidence and applicable authority the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor is a twenty-five-year-old high school graduate who is divorced with two minor children; Debtor had worked as a paralegal for approximately two years at the time she filed her case. Her Schedule "I" of income and Schedule "J" expenditures revealed gross monthly pay of \$1,785.00, net pay of \$1,089.56 and expenditures of \$1,649.00. The income schedule also stated "perhaps ex-spouse will begin making alimony and child support payments." (Ex. P-4). Testimony revealed that pursuant to a 1994 divorce decree Debtor's ex-husband is obligated to pay \$95.00 per week or approximately \$408.00 per month in child support. If paid, these support payments would bring her total income after taxes to approximately \$1,500.00 with expenditures remaining at \$1,649.00.

Sometime in June 1996 Debtor received a Visa Gold Card invitation from Plaintiff First Card which indicated she had a pre-approved credit line of \$5,000.00, subject to the requirement that the "coupon must be filled out completely to be processed." (Ex. P-1). The Visa Gold invitation required her to reveal the name and address of her employer, her Social Security number, her date of birth, her home and business telephone numbers, and to affix her signature. The invitation further provided

as follows:

I (we) certify that I (we) am (are) 18 years of age or older and that the information provided is accurate. FCC National Bank reserves the right to obtain a current credit bureau report and to cancel its offer if certain adverse information appears on such report, if it is unable to obtain such report and/or if FCCNB is not able to verify the above information.

(Ex. P-1). At the time Plaintiff extended the credit to her, First Card never called to verify any information provided, never asked her for any further financial information, and at no time prior to her filing bankruptcy did First Card instruct her to cease using the card.

In July 1996 Debtor purchased a computer, charging the \$1,200.00 purchase to the Visa Card. (Ex. P-2). The only other charges on the card were made in September 1996 to a shoe store, a department store, a book store, and a dentist. These charges together total \$141.78. (Ex. P-3). Debtor paid \$45.00 in September and October, but did not pay anything from November to February when she filed bankruptcy.¹ In late August/early September 1996, Debtor attempted to transfer a balance from another credit card in the amount of \$4,500.00 to the First Card account, but the transfer was not honored. (Ex. P-3). In October 1996 she successfully transferred a \$2,065.00 balance from her First USA credit card to this card. Ultimately, Debtor was forced to file

¹ Neither of Debtor's payments met the minimum payment required for that billing cycle.

bankruptcy in order to deal with the cash flow shortage which occurred when her ex-husband missed three successive child support payments; additionally, a large deficiency claim arising from the repossession and sale at a loss of her ex-husband's automobile was asserted against her.

Debtor testified that prior to the difficulty she encountered when her husband stopped making child support payments, she had managed to maintain her credit card payments, either by using tax returns, transferring balances to a new card with a lower interest rate, or with what extra money she had each month. While she worked as a paralegal with a Brunswick law firm, she had no particular bankruptcy experience; in fact, it was her parents' suggestion that bankruptcy was her best avenue after the financial problems she encountered. Debtor has currently stopped working and returned to school. She lives in property owned by her parents and pays rent when it is possible for her to do so, with child care being provided by her mother while she attends classes.

Contentions of the Parties

Based on this evidence, First Card contends that the debt should be excepted from discharge under 11 U.S.C. § 523(a)(2), in that she had no ability to repay the debt at the time the credit card was obtained and that the circumstances support a finding that she committed actual fraud on the credit card company. The Debtor contends, to the contrary, that she made no misrepresentations on the credit application nor by any other medium, that she had the current income to maintain her payments for

a time as evidenced by the fact that she maintained payments until financial difficulties arising out of her divorce engulfed her, and that taking all circumstances into account this debt should be determined dischargeable.

CONCLUSIONS OF LAW

11 U.S.C. Section 523(a)(2)(A) provides:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt ---

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

In an action to determine the nondischargeability of debt, the plaintiff bears the burden of proving by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Moreover, courts are to construe exceptions to discharge narrowly. Schwieg v. Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986) ("Because of the very nature and philosophy of the Bankruptcy law the exceptions to dischargeability are to be construed strictly.", citing Gleason v. Thaw, 236 U.S. 558, 562, 35 S.Ct. 287, 59 L.Ed. 717 (1915)).

In the Eleventh Circuit, a credit card creditor cannot establish nondischargeability of debts under “false pretense” or “false misrepresentation” unless those debts were incurred after the creditor “unequivocally and unconditionally” communicated revocation of card privileges to the debtor. First Nat’l Bank of Mobile v. Roddenberry, 701 F.2d 927, 932 (1983).² The Roddenberry court relied on precedent of the former Fifth Circuit which held that the former Act did not discharge credit debts obtained “through concealment of insolvency and present inability to pay.” Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1940), *cert. denied*, 313 U.S. 564, 61 S.Ct. 841, 85 L.Ed. 1523 (1941).

Where credit card transactions are concerned, decisions of nondischargeability are to be “guided by the principles underlying Davison-Paxon that discharge exceptions are to be narrowly construed and that improvident creditors are not to be afforded special protections in bankruptcy for the assumption of common business risks.” Roddenberry, 701 F.2d at 932. Roddenberry, however, did not construe the meaning of the term “actual fraud” in Section 523(a)(2). The court noted that the addition of “actual fraud” to the 1978 Code “may alter the outcome in certain cases where debtors obtain credit without a present intention of repayment,” but was quick to emphasize that it “express[ed] no opinion with respect to this construction of section 523(a)(2).” Id. at

² The Roddenberry court construed a nearly identical section of the Bankruptcy Act of 1898; however, its decision remains the law of this Circuit with regard to Section 523(a)(2)(A) of the Bankruptcy Code. See Birmingham Trust National Bank v. Case, 755 F.2d 1474, 1476 (11th Cir. 1985) (“Since the differences between § 17(a)(2) and § 523(a)(2)(A) are negligible, case law construing § 17(a)(2) serves as a useful guide in applying § 523(a)(2)(A) of the Code.”).

The operative terms in Section 523(a)(2), including the phrase “actual fraud,” carry acquired meanings of terms of art and imply elements set by common law. Field v. Mans, 516 U.S. 59, 116 S.Ct. 437, 443, 133 L.Ed.2d 351 (1995). Therefore, in order to except a particular debt from discharge because of actual fraud, a creditor must prove the following:

- (1) the debtor made a false representation with the purpose and intention of deceiving the creditor;
- (2) the creditor relied upon such representation;
- (3) such reliance by the creditor was justifiable;³
- (4) the creditor suffered a loss as a result of that reliance.

Hunter, 780 F.2d at 1579.

“Under the guidelines set in Davison-Paxon Co. and Roddenberry, the correct test for determining actual fraud in a credit card transaction is whether the debtor intended to repay the charges at the time they were incurred.” In re Latargia, Ch. 7 Case 95-10558, Adv. Pro. No. 95-01064A, slip op. at 6 (Bankr. S.D.Ga. May 21, 1996) (Dalis, J.). A debtor represents at the time of a credit card purchase, through her signature on

³ Field v. Mans, 116 S.Ct. at 444. The Supreme Court held that in analyzing a creditor’s reliance on a debtor’s misrepresentation, the reliance need only be justifiable and is not required to be reasonable by objective standards.

the charge slip, that she will repay the debt.⁴ No other representation occurs at the time of the credit transaction. This representation is false if she does not intend to honor that promise at the time she makes it. To determine the falsity of this representation the Court must make a determination of the debtor's intent at the time the promise to pay was made. In analyzing a debtor's intent at the time of the purchase, the majority of courts utilize a test which includes the following factors:

1. The length of time between the charges made and the filing of bankruptcy;
2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;
3. The number of charges made;
4. The amount of charges made;⁵
5. The financial condition of the debtor at the time the charges were made;
6. Whether the charges were above the credit limit of the account;
7. Whether the debtor made multiple charges on the same day;
8. Whether or not the debtor was employed;

⁴ The standard credit card slip signed by a credit card user contains a promise to pay the total amount shown on the slip according to the card issuer agreement.

⁵ Where a debtor makes multiple charges of amounts less than \$ 50.00, most courts construe this factor in favor of the creditor, whereas charges in amounts of greater than \$ 50.00 appear to weigh more heavily in favor of the debtor. This analysis may seem inapposite, given that the debtor is incurring larger debt by making larger purchases; however, the reality is that most merchants, as a routine matter, make inquiry about the credit status of a cardholder when purchases exceed \$ 50.00. Thus, taking the third and fourth factors together, large numbers of small purchases are more likely to indicate credit card fraud. See In re Johnson, 141 B.R. 473, 478 (Bankr. M.D.Ga. 1992); In re Cacho, 137 B.R. 864, 867 (Bankr. N.D.Fl. 1991). Of course, this Court recognizes that small charges can indicate as well that a debtor is not attempting to defraud a credit card company, because the debtor is not incurring exorbitant debt. See In re Acker, 207 B.R. 12, 18 (Bankr. M.D.Fl. 1997).

9. The debtor's prospects for employment;
10. Financial sophistication of the debtor;
11. Whether there was a sudden change in the debtor's buying habits; and
12. Whether the purchases were made for luxuries or necessities.

In re Johnson 141 B.R. 473, 478 (Bankr. M.D.Ga. 1992); In re Carpenter, 53 B.R. 724, 730 (Bankr. N.D.Ga. 1985). As a note of caution, a determination that any specific debtor did or did not have fraudulent intent is of course "a case by case decision, in which the above factors may or may not be helpful." Carpenter, 53 B.R. at 730.

On balance, I find that First Card has failed to carry its burden to prove actual fraud on the part of Defendant. Debtor filed her Chapter 7 petition in February of 1997, five months after her last charge to the credit card and almost four months after her last cash advance.⁶ This timing is short; however, it is not so short a time as to warrant an inference of actual fraud. *Cf. In re Cacho*, 137 B.R. 864, 866 (Bankr. N.D.Fl. 1991) (one and a half months not fraudulent). Certainly there was no last-minute pre-bankruptcy credit spree.

Debtor did not consult her attorney about filing bankruptcy until just

⁶ A cash advance check for \$ 1000.00 was paid to "1st USA" by First Card on October 21, 1997. At trial, Defendant denied writing the check, and stated that her ex-husband holds a credit card with that entity. For purposes of analysis of the above factors, and because Plaintiff failed to produce the check at trial, this Court will accept the premise that she did not write the check but that her husband may have.

before she filed; therefore, Plaintiff has not shown that Debtor was contemplating bankruptcy in order to avoid repayment at the time she made the charges and advances.⁷ Likewise, she did not make an extraordinary number of charges on the card. Although Defendant made multiple charges on some dates, neither the number nor the amount of those charges is unusual. With regard to the amount of the transfer balance, while it is a larger amount than the charges on the card, Defendant testified that the main reason she obtained this credit card was to take advantage of its lower interest rate. Thus, her actions do not indicate actual fraud.

Plaintiff relies heavily upon the Debtor's financial condition in its position that her inability to pay is conclusive evidence of actual fraudulent intent. This position is too broad; moreover, it is exactly the argument rejected in Roddenberry and Davison-Paxon. Latargia, No. 95-01064A, slip op. at 6. Debtor was struggling financially but did not fall behind until the child support was interrupted. Moreover, while a debtor's financial condition may be used as an element in proving that fraudulent intent exists, taken by itself an "inability to pay --- hopeless insolvency --- does not support an inference that the debtor lacked an intent to repay." In re Hearn, 1997 Bankr. LEXIS 1166 (Bankr. N.D.Ga. 1997) (Murphy, J.). Debtor's initial unsuccessful attempt to transfer a balance from another credit card, which would have exceeded the limit on

⁷ Plaintiff made much of the fact that Debtor worked as a paralegal at a law firm where two attorneys practice bankruptcy law and that Debtor had taken a bankruptcy course in her paralegal training. This Court finds that these facts do not meet Plaintiff's burden of proving actual fraud. First, prior knowledge of a debtor of the bankruptcy process, in and of itself, does not automatically implicate her as having acted fraudulently. Second, and more importantly, Debtor testified that she did not do bankruptcy work as a paralegal and that she had only basic experience from her paralegal course.

this card, would raise some inference of fraudulent intent if the charge had been honored and if the over-the-limit balance were the subject of this case; however, taken in context with Debtor's testimony and the more limited charges which were honored, this isolated attempt does not carry the burden for Plaintiff.

This Court is further persuaded by the fact that Debtor was employed at the time she incurred this debt; Plaintiff has not shown this Court that her prospects of continuing employment were anything but sound. Further, Plaintiff did not show that Debtor changed her buying habits nor did Plaintiff show that the purchases she made were "luxury" items. The computer that Debtor purchased by charging it to her First Card might or might not be characterized as a "luxury" item; however, Plaintiff presented no evidence that it was in fact a luxury item. Debtor could just as easily have used the computer for work or for her children's education. This Court finds that none of these factors are indicative of fraudulent intent. Lastly, the Debtor is not financially sophisticated, as the phrase has been applied under § 523(a)(2)(A) analysis.

CONCLUSION

"[A] mere breach of contract by the debtor or a mere failure to fulfill a promise to pay for goods, is, without more, insufficient to establish nondischargeability." Bell v. Sturgess, Ch. 7 Case No. 90-41750, Adv. Pro. No. 90-4210, slip op. at 4 (Bankr. S.D.Ga. May 22, 1991) (Davis, J.); *see also* Roddenberry, 701 F.2d at 932 (mere breach of credit conditions is of minimum probative value). This Court finds that Plaintiff failed

to carry its burden by a preponderance of the evidence that Debtor fraudulently promised to repay the debt to First Card when she had no present intent to do so.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS
THE ORDER OF THIS COURT that Debtor's obligation to Plaintiff is discharged.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 1997.